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DEC 2 2005

No. 04-1034*

In the

Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; and PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 28, 2005
CERTIORARI GRANTED OCTOBER 11, 2005

* This case is consolidated with No. 04-1384

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN (DETROIT)

UNITED STATES OF AMERICA, No. 2:94-cv-70788

Plaintiff,

v.

JOHN A. RAPANOS, JUDITH A. NELKIE-RAPANOS, PRODO, INC., ROLLING MEADOWS HUNT CLUB, PINE RIVER BLUFF ESTATES, INC.,

Defendants.

February 25, 1994	Complaint filed by Plaintiff United States.
July 28, 1994	Answer filed by Defendant John A. Rapanos to complaint with jury demand.
June 17, 1996	Amended complaint filed by United States adding Judith A. Nelkie-Rapanos, Prodo, Inc., and Rolling Meadows Hunt Club.
February 20, 1997	Motion filed by United States for partial summary judgment.
March 14, 1997	Response filed by Defendants to motion for partial summary judgment.

September 30, 1997	Memorandum opinion and order filed by Judge Bernard A. Friedman denying United States' motion for partial summary judgment and denying Defendants' motion to dismiss.
October 28, 1997	Answer filed by Defendants to amended complaint.
February 23, 1998	Second amended complaint filed by United States adding Pine River Bluff Estates, Inc.
April 13, 1998	Answer filed by Defendants to second amended complaint.
December 16, 1998	Motion filed by United States for partial summary judgment.
December 28, 1998	Amended Memorandum filed by United States in support of motion for partial summary judgment.
January 15, 1999	Cross-motion filed by Defendants for summary judgment on Count VI of Plaintiff's second amended complaint—Jefferson Avenue (Scenic Estates) Site.
January 15, 1999	Response filed by Defendants to motion for partial summary judgment by United States.
February 2, 1999	Reply filed by United States to response to motion for partial summary judgment by United States.

February 2, 1999	Response filed by United States to motion for summary judgment on Count VI of Plaintiff's second amended complaint—Jefferson Avenue (Scenic Estates) Site.
February 23, 1999	Order by Judge Bernard A. Friedman denying motion for partial summary judgment by United States, granting in part motion for summary judgment on Count VI of Plaintiff's second amended complaint—Jefferson Avenue (Scenic Estates) Site.
September 27, 2000	Trial brief filed by United States.
October 5, 2000	Trial brief filed by Defendants.
October 31, 2000	Order by Judge Bernard A. Friedman regarding remedy phase.
February 11, 2003	Final partial judgment by Judge Bernard A. Friedman for United States against Pine River Bluff Estates, John A. Rapanos, Judith A. Nelkie-Rapanos, Prodo, Inc., and Rolling Meadows Hunt Club.
April 4, 2003	Appeal filed by Defendants.
February 28, 2005	Consent order approving form of letter credit and identifying mitigation parcels.

March 1, 2005	Letter from Supreme Court regarding notice of appeal. Petition for writ of certiorari filed and placed on the February 2, 2005, docket.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, No. 03-1489

Plaintiff-Appellee,

v.

JOHN A. RAPANOS, JUDITH A. RAPANOS, PRODO INC., and ROLLING MEADOWS HUNT CLUB,

Defendant-Appellants.

April 29, 2003	Civil case docketed.
July 1, 2003	Brief filed by Appellants.
August 1, 2003	Brief filed by Appellee.
August 19, 2003	Corrected Appellee Brief filed.
September 2, 2003	Reply Brief filed by Appellants.
June 9, 2004	Cause argued by David E. Dearing for Appellants and Katherine W. Hazard for Appellee before Judges Siler, Gibbons, and Reeves.
July 26, 2004	Opinion filed affirming the judgment of the district court.
September 9, 2004	Petition for en banc rehearing filed by Appellants.
November 2, 2004	Order filed denying petition for en banc rehearing.

November 10, 2004 Mandate issued with no cost taxed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	) Civil Action
	) No. 94-CV-70788DT
JOHN A. RAPANOS; *et al.*	) HON. BERNARD
	) FRIEDMAN
Defendants.	

SECOND AMENDED COMPLAINT

The United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of the Administrator of the Environmental Protection Agency ("EPA"), brings this Second Amended Complaint and alleges as follows:

NATURE OF COMPLAINT

1. This is a civil action seeking injunctive relief and civil penalties for violations of sections 301, 308, 309 and 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1311, 1318, 1319 and 1344. The purpose of this action is to enjoin the discharge of pollutants into waters of the United States without a permit, in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a); to require Defendants to implement appropriate remedial measures to restore said waters to their condition prior to past unlawful discharges; to obtain mitigation for any environmental damage caused by the unlawful actions of

Defendants; and to require the payment of appropriate civil penalties.

2. Authority to bring this action is vested in the United States Department of Justice by 28 U.S.C. §§ 516 and 519, and 33 U.S.C. § 1366.

3. Plaintiff filed a Complaint herein on February 25, 1994 ("Complaint") seeking injunctive relief and civil penalties for violations of sections 301, 308, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1318, 1319 and 1344.

4. The trial of the related criminal case of United States v. John A. Rapanos, Cr. No. 93-CR-20023 was based upon a July 21, 1994 Superseding Indictment, and began in February, 1995 before the Honorable Lawrence P. Zatkoff. The trial ended with the conviction of defendant on Counts One and Four of the Superseding Indictment by the jury in March, 1995. The August 1995 order for a new trial in that case was reversed by the United States Court of Appeals for the Sixth Circuit on May 28, 1997. The United States Supreme Court denied certiorari on October 14, 1997.

JURISDICTION AND VENUE

5. This Court has Jurisdiction of the subject matter of this action and jurisdiction over the parties herein pursuant to 28 U.S.C. §§ 1331, 1345 and 1355, and CWA section 309(b), 33 U.S.C. § 1319(b). All of the violations alleged herein occurred in this district, and Defendants reside and do business in this district.

6. The Second Amended Complaint states a claim upon which relief can be granted pursuant to CWA sections 301, 309, and 404, 33 U.S.C. §§ 1311, 1319, and 1344.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), and CWA section 309(b), 33 U.S.C. § 1319(b).

DEFENDANTS

8. The business address for each of the Defendants, John A. Rapanos, Judith A. Nelkie Rapanos, Prodo, Inc., Rolling Meadows Hunt Club, and Pine River Bluff Estates, Inc., is 925 East Wheeler Street, Midland, Michigan 48642.

9. Defendant John A. Rapanos is a resident of the State of Michigan. John A. Rapanos regularly does business as a real estate developer. John A. Rapanos is the chief executive, President and registered agent of Defendant Prodo, Inc.

10. Defendant Judith A. Nelkie Rapanos is a resident of the State of Michigan, and is the wife of Defendant John A. Rapanos. Judith A. Nelkie Rapanos has at all material times worked with Defendant John A. Rapanos in his business activities concerning one or more of the sites which are the subject of this Second Amended Complaint. Judith A. Nelkie Rapanos is the President and sole corporate officer of Defendant Pine River Bluff Estates, Inc.

11. Defendant Prodo, Inc., is a Michigan corporation doing business in this state.

12. Defendant Rolling Meadows Hunt Club is an unincorporated association doing business in this state. Rolling Meadows Hunt Club is one of the assumed names for Defendant Prodo, Inc.

13. Defendant Pine River Bluff Estates, Inc. is a Michigan corporation doing business in this state.

VIOLATION SITES

14. One or more of the Defendants own, operate or control each violation site as described below. Defendants have developed and continue to develop and use the sites for residential or commercial purposes. Each of the sites contains waters of the United States.

15. The Salzburg Road site is located south of the US-10 Freeway, west of the M-47 Freeway, north of Salzburg Road, and east of Flajole Road, between Midland, Michigan and Auburn, Michigan, in Williams Township, Section 29, Township 14 North, Range 3 East, Bay County. On information and belief, this site consists of at least 230 acres. At all relevant times, Defendant John A. Rapanos has owned and operated this site. A series of ditches within and adjacent to this site are tributaries of the Kawkawlin River, a tributary of Lake Huron's Saginaw Bay. Prior to the violations alleged below, this site contained palustrine forested and scrub-shrub wetlands, contained hydrophytic vegetation and was underlain by hydric soils which are frequently saturated to the surface.

16. The Hines Road site is located near Midland, in Homer Township, Sections 1 and 12, Township 14 North, Range 1 East, Midland County. This site contains palustrine forested and scrub-shrub wetlands, contains hydrophytic vegetation and is underlain by hydric soils which are frequently saturated to the surface. On information and belief, this site consists of approximately 275 acres. At all relevant times, one or more Defendants owned and/or operated this site. On information and belief, this site is sometimes referred to as the Northwood parcel.

17. The Pine River site is located near Midland, in Homer Township, Sections 25 and 26, Township 14 North, Range East, Midland County. The palustrine forested wetlands of this site are adjacent to the Pine River, a tributary of the Tittabawassee River. This site is underlain by hydric soils, contains hydrophytic vegetation, and has a wetlands hydrology. On information and belief, this site consists of approximately 200 acres. At all relevant times, Defendant Pine River Bluff Estates, Inc. owned and one or more Defendants operated this site. On information and belief, this site is sometimes referred to as the Pine River Bluff Estates site, or the Woodcock and Miller Roads site.

18. The Tittabawassee River site is located on Saginaw Road, in Mapleton, Michigan, in Ingersoll Township, Sections 1 and 2, Township 13 North, Range 2 East, Midland County, and is adjacent to Tittabawassee River. This site contains palustrine forested wetlands, within a floodway of the Tittabawassee River, a tributary of Lake Huron. The wetlands at this site are flooded from time to time by the Tittabawassee River, and at other times the hydric soils underlying the site are saturated within the upper layers. Hydrophytic vegetation is also found at this site. On information and belief, this site consists of approximately 57 acres. At all relevant times, Defendant John A. Rapanos owned and operated this site. On information and belief, this site is sometimes referred to as the Mapleton site.

19. The Freeland site is located near the intersection of Midland Road (M-47) and Tittabawassee Road, near Freeland, in Tittabawassee Township, Section 35, Township 13 North, Range 3 East, Saginaw County. This site contains a palustrine emergent wetland, contains hydrophytic vegetation, is underlain by hydric soils, and has a wetlands hydrology. On information and belief, this site consists of approximately 80 acres. At all relevant times, Defendant John A. Rapanos owned or operated this site.

20. The Jefferson Avenue site includes, but is not limited to, the area located north of East Chapel Lane in the City of Midland, Section 3, Township 14 North, Range 2 East, Midland County. This site contains forested wetlands, contains hydrophytic vegetation, and has wetlands hydrology. On information and belief, this site consists of approximately 56 acres. At all relevant times, one or more Defendants owned and/or operated this site. On information and belief, this site is sometimes referred to as the Scenic Estates site or the Scenic site.

GENERAL ALLEGATIONS APPLICABLE TO ALL COUNTS

21. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits any person from discharging any pollutant from any point source into waters of the United States except, to the extent relevant here, in accordance with the terms of a valid permit issued by the Secretary of the Army, acting through the Chief of the United States Army Corps of Engineers ("Corps"), or by a state agency pursuant to an approved state program. Section 404 of the CWA, 33 U.S.C. § 1344.

22. The State of Michigan, through the Michigan Department of Natural Resources ("MDNR"), assumed authority to manage the Section 404 permit program, and Michigan now operates it through the Michigan Department of Environmental Quality ("MDEQ") pursuant to 33 U.S.C. § 1344(h), 40 C.F.R. Part 233 (1995), a December 9, 1983 Memorandum of Agreement with EPA, and an April 2, 1984 Memorandum of Agreement with the Corps.

23. "Waters of the United States" are defined in 33 C.F.R. § 328.3(a) and 40 C.F.R. § 232.2 (1995), to include the following: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all other waters, such as, among others, rivers, streams, or wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce; (iii) tributaries of such waters; and (iv) wetlands adjacent to such waters or their tributaries.

24. The term "point source" is defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14), and includes but is not limited to mechanical land clearing machinery, shovels, trucks, bulldozers, backhoes, excavators, and other earthmoving equipment.

25. The term "pollutant" is defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6), and includes but is not limited to dredged or fill material.

26. The term "person" is defined in section 502(5) of the CWA, 33 U.S.C. § 1362(5), and includes but is not limited to individuals, corporations, and associations.

27. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes EPA to commence a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates section 301(a) of the CWA, 33 U.S.C. § 1311(a). Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates section 301(a) shall be subject to civil penalties not to exceed $25,000 per day of such violation between February 4, 1987, and January 30, 1997, and civil penalties not to exceed $27,500 per day of such violation after January 30, 1997.

28. Each of the Defendants is a person within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

29. The wetlands alleged in this Second Amended Complaint to have been unlawfully filled or otherwise impacted are or were inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and under normal circumstances do or did support, a prevalence of vegetation typically adapted for life in saturated soil conditions. These wetlands constitute or constituted waters of the United States within the meaning of the CWA and regulations promulgated thereunder.

CLAIMS FOR RELIEF

COUNT ONE—VIOLATION OF CWA § 301 AT THE SALZBURG ROAD SITE

30. The allegations contained in paragraphs 1 through 29 inclusive are realleged and incorporated herein.

31. Defendant John A. Rapanos used or caused the use of various machinery and earthmoving equipment to discharge fill material at the Salzburg Road site. Defendant John A. Rapanos further engaged or caused others to engage in additional activities at this site, including excavating ditches and tiling, which disturbed areas which under normal circumstances were wetlands.

32. The materials discharged at the Salzburg Road site constitute "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

33. The materials discharged at the Salzburg Road site were placed into waters of the United States.

34. The various machinery and earthmoving equipment used to discharge the materials at the Salzburg Road site constitute "point sources" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

35. The above-referenced discharges of pollutants from point sources into waters of the United States occurred without a permit.

36. Defendant John A. Rapanos has violated and continues to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), in connection with the Salzburg Road site.

37. Each and every day the fill material discharged into the waters of the United States remains in place constitutes an independent violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COUNT TWO—VIOLATION OF CWA § 301
AT THE HINES ROAD SITE

38. The allegations contained in paragraphs 1 through 37 inclusive are realleged and incorporated herein.

39. Defendants John A. Rapanos and/or Prodo, Inc., used or caused the use of various machinery and earthmoving equipment to discharge fill material at the Hines Road site. Defendants John A. Rapanos and/or Prodo, Inc., further engaged or caused others to engage in additional activities at this site, including excavating ditches and dredging, which disturbed areas which under normal circumstances were wetlands.

40. The materials discharged at the Hines Road site constitute "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

41. The materials discharged at the Hines Road site were placed into waters of the United States.

42. The various machinery and earthmoving equipment used to discharge the materials at the Hines Road site constitute "point sources" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

43. The above-referenced discharges of pollutants from point sources into waters of the United States occurred without a permit.

44. Defendants John A. Rapanos and/or Prodo, Inc., have violated and continue to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), in connection with the Hines Road site.

45. Each and every day the fill material discharged into the waters of the United States remains in place constitutes an independent violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COUNT THREE—VIOLATION OF CWA § 301
AT THE PINE RIVER SITE

46. The allegations contained in paragraphs 1 through 45 inclusive are realleged and incorporated herein.

47. Defendants Judith A. Nelkie Rapanos, John A. Rapanos, and/or Pine River Bluff Estates, Inc., used or caused the use of various machinery and earthmoving equipment to discharge fill material at the Pine River site. Defendants Judith A. Nelkie Rapanos, John A. Rapanos, and/or Pine River Bluff Estates, Inc. further engaged or caused others to engage in additional activities at this site, including excavating ditches and dredging, which disturbed areas which under normal circumstances were wetlands.

48. The materials discharged at the Pine River site constitute "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

49. The materials discharged at the Pine River site were placed into waters of the United States.

50. The various machinery and earthmoving equipment used to discharge the materials at the Pine River site constitute "point sources" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

51. The above-referenced discharges of pollutants from point sources into waters of the United states occurred without a permit.

52. Defendants Judith A. Nelkie Rapanos, John A. Rapanos, and/or Pine River Bluff Estates, Inc., have violated and continue to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), in connection with the Pine River site.

53. Each and every day the fill material discharged into the waters of the United States remains in place constitutes an independent violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COUNT FOUR—VIOLATION OF CWA § 301
AT THE TITTABAWASSEE RIVER SITE

54. The allegations contained in paragraphs 1 through 53 inclusive are realleged and incorporated herein.

55. The State of Michigan and the Corps executed a Memorandum of Agreement dated April 2, 1984. This Agreement establishes the Corps' joint jurisdiction with Michigan over waterways regulated under section 10 of the Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 403, including the Great Lakes, tributaries and adjacent wetlands. The Tittabawassee River site is within this category.

56. Defendant John A. Rapanos used or caused the use of various machinery and earthmoving equipment to discharge fill material at the Tittabawassee River site. Defendant John A. Rapanos further engaged or caused others to engage in additional activities at this site, including excavating ditches and dredging, which disturbed areas which under normal circumstances were wetlands.

57. The materials discharged at the Tittabawassee River site constitute "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

58. The materials discharged at the Tittabawassee River site were placed into waters of the United States.

59. The various machinery and earthmoving equipment used to discharge the fill materials constitute "point sources" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

60. The above-referenced discharges of pollutants from point sources into waters of the United States occurred without a permit.

61. Defendant John A. Rapanos has violated and continues to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), in connection with the Tittabawassee River site.

62. Each and every day the fill material discharged into the waters of the United States remains in place constitutes an independent violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COUNT FIVE—VIOLATION OF CWA § 301
AT THE FREELAND SITE

63. The allegations contained in paragraphs 1 through 62 inclusive are realleged and incorporated herein.

64. Defendant John A. Rapanos used or caused the use of various machinery and earthmoving equipment to discharge fill material at the Freeland site. Defendant John A. Rapanos further engaged or caused others to engage in additional activities at this site, including excavating ditches and dredging, which disturbed areas which under normal circumstances were wetlands.

65. The materials discharged at the Freeland site constitute "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

66. The materials discharged at the Freeland site were placed into waters of the United States.

67. The various machinery and earthmoving equipment used to discharge the fill materials constitute "point sources" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

68. The above-referenced discharges of pollutants from point sources into waters of the United States occurred without a permit.

69. Defendant John A. Rapanos has violated and continues to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), in connection with the Freeland site.

70. Each and every day the fill material discharged into the waters of the United States remains in place constitutes an

independent violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

COUNT SIX—VIOLATION OF CWA § 301
AT THE JEFFERSON AVENUE SITE

71. The allegations contained in paragraphs 1 through 70 inclusive are realleged and incorporated herein.

72. Defendants John A. Rapanos and/or Prodo, Inc. used or caused the use of various machinery and earthmoving equipment to discharge fill material at the Jefferson Avenue site. Defendants John A. Rapanos and/or Prodo, Inc. further engaged or caused others to engage in additional activities at this site, including excavating ditches and dredging, which disturbed areas which under normal circumstances were wetlands.

73. The materials discharged at the Jefferson Avenue site constitute "pollutants" as defined in section 502(6) of the CWA, 33 U.S.C. § 1362(6).

74. The materials discharged at the Jefferson Avenue site were placed into waters of the United States.

75. The various machinery and earthmoving equipment used to discharge the fill materials constitute "point sources" as defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

76. The above-referenced discharges of pollutants from point sources into waters of the United States occurred without a permit.

77. Defendants John A. Rapanos and/or Prodo, Inc. have violated and continues to violate section 301(a) of the CWA, 33 U.S.C. § 1311(a), in connection with the Jefferson Avenue site.

78. Each and every day the fill material discharged into the waters of the United States remains in place constitutes an

independent violation of section 301(a) of the CWA, 33 U.S.C. § 1311 (a).

COUNT SEVEN—VIOLATION OF CWA § 308

79. The allegations contained in paragraphs 1 through 78 inclusive are realleged and incorporated herein.

80. Section 308(a) of the CWA, 33 U.S.C. § 1318(a), authorizes EPA to require a person to provide information relevant to determine whether a violation of the CWA has occurred, what appropriate remediation measures should be taken, and such other information as EPA may reasonably require.

81. On May 31, 1991, EPA issued to Defendant John A. Rapanos an information request pursuant to CWA section 308(a), 33 U.S.C. § 1318(a), regarding the Salzburg Road site.

82. Defendant John A. Rapanos has failed to respond adequately and truthfully, or has refused to respond, to substantial parts of the May 31, 1991 information request, in violation of section 308(a) of the CWA, 33 U.S.C. § 1318(a).

COUNT EIGHT—VIOLATIONS OF CWA § 309

83. The allegations contained in paragraphs 1 through 82 inclusive are realleged and incorporated herein.

84. Section 309(a) of the CWA, 33 U.S.C. § 1319(a), authorizes EPA to issue an administrative compliance order to a person to secure compliance with the CWA and to compel appropriate remediation.

85. On May 31, 1991, EPA issued to Defendant John A. Rapanos an Administrative Compliance Order pursuant to CWA section 309(a), 33 U.S.C. § 1319(a), regarding the Salzburg Road site.

86. Defendant John A. Rapanos has failed to comply with the May 31, 1991 Administrative Compliance Order by failing to certify an intention to comply with that Order, by failing to submit an acceptable wetland restoration plan, and by failing to perform such a plan, in violation of an order under section 309(a) of the CWA, 33 U.S.C. § 1319(a), in connection with the Salzburg Road site.

87. On September 22, 1997, EPA issued to Defendants John A. Rapanos, Judith A. Nelkie Rapanos, Pine River Bluff Estates, Inc., Prodo, Inc., and Rolling Meadows Hunt Club an Administrative Compliance Order pursuant to CWA section 309(a), 33 U.S.C. § 1319(a), regarding the Hines Road, Pine River, and Jefferson Avenue sites.

88. Defendants John A. Rapanos, Judith A. Nelkie Rapanos, Pine River Bluff Estates, Inc., Prodo, Inc., and Rolling Meadows Hunt Club have failed to comply with the September 22, 1997 Administrative Compliance Order by failing to certify an intention to comply with that Order, by failing to submit an acceptable wetland restoration plan, and by failing to perform such a plan, in violation of an order under section 309(a) of the CWA, 33 U.S.C. § 1319(a), in connection with the Hines Road, Pine River, and Jefferson Avenue sites.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court provide the following relief:

A. Injunctive Relief. That Defendants and each of them be permanently enjoined from violating the CWA, including but not limited to discharging or causing the discharge of dredged or fill materials into wetlands or other waters of the United States except as in compliance with a valid permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344. Further, that Defendants be ordered to accomplish full restoration of all waters of the United States, including but not

limited to wetlands, impacted by their unlawful activities. Further, that Defendants be ordered to effect mitigation for any environmental damage caused by their unlawful activities;

B. Civil Penalties. That Defendants and each of them be assessed civil penalties pursuant to section 309(d) of the CWA, 33 U.S.C. § 1319(d), for each day of violation at each violation site, in an amount not to exceed $25,000.00 per day per violation per site between February 5, 1987, and January 30, 1997, and not to exceed $27,500 per day per violation per site after January 30, 1997;

C. That Plaintiff be awarded its costs and disbursements in this action; and

D. That this Court grant such other relief as may be just and proper.

Dated: February 20, 1998

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	
Plaintiff,	
v.	) Civil Action
	) No. 94-CV-70788DT
JOHN A. RAPANOS; *et al.*	) HON. BERNARD
	) FRIEDMAN
Defendants.	

THE PARTIES' STIPULATIONS VOLUME I

A. FACTS RELEVANT TO ALL DEFENDANTS.

1. This case involves five sites in and near Midland, Michigan. They are known, for the purposes of this case, as (1) the Salzburg Site, (2) the Pine River (or Woodcock and Miller Roads) Site, (3) the Hines Road (or Countryside or Rolling Meadows or Northwood) Site), (4) the Tittabawassee River (or Mapleton) Site, and (6) the Freeland Site. The locations and approximate boundaries of the Sites are set forth in *Plaintiff's Exhibit in Support of Motion for Partial Summary Judgment* ("Pl. Ex.") 1.

2. Defendant John A. Rapanos is a natural person.

3. John A. Rapanos is the President and sole shareholder of Defendant Prodo, Inc., and has been since at least since 1980.

4. Defendant Prodo, Inc. is a Michigan corporation.

5. Defendant Judith Ann Nelkie Rapanos is a natural person who is married to Defendant John A. Rapanos.

6. Judith Ann Nelkie Rapanos is the President and sole shareholder of Defendant Pine River Bluff Estates, Inc. ("PRBE"). PRBE was incorporated by Judith Ann Nelkie Rapanos in June 1993.

7. Defendant PRBE is a Michigan Corporation.

8. None of the Defendants had a permit issued to it under the Clean Water Act to discharge pollutants into any water of the United States.

B. FACTS RELEVANT TO THE PINE RIVER SITE

(1) Facts Relevant to Whether the Defendants are Persons Liable for the Activities at the Pine River Site

(a) John A. Rapanos and Prodo, Inc. at the Pine River Site

9. The following five entities performed work at the Pine River Site: Defendant Prodo, Inc., Pat's Gradall Service, Bilacic Trucking, Inc. Three-S Construction, and Fisher Contracting.

10. The work performed by these contractors was conducted, authorized, contracted or paid for by one or more Defendants, and was generally directed by John A. Rapanos. Work at the Pine River Site was accomplished pursuant to a plan drawn up by John A. Rapanos and Ayres Associates.

11. Work performed by Prodo, Inc. at the Pine River Site was generally directed by John A. Rapanos, with some oversight by Jeffrey Brown. Jeffrey Brown was an employee of Prodo, Inc.

12. Work performed by Pat's Gradall at the Pine River Site was generally directed by John A. Rapanos.

13. Work performed by Bilacic Trucking at the Pine River Site was generally directed by John A. Rapanos.

14. Work performed by Three-S Construction at the Pine River Site was generally directed by John A. Rapanos.

15. Work performed by Fisher Contracting was arranged for by John A. Rapanos. John A. Rapanos personally talked with Fisher Contracting about its work at the Pine River Site. John A. Rapanos had an employee on site to help Fisher Contracting.

(b) Judith Ann Nelkie Rapanos and PRBE at the Pine River Site

16. The Pine River Site has had multiple ownership during the period 1992 to present.

17. Parcel 001, as approximately identified on Ex. __ to these Stipulations, is also known as the Holler property (hereinafter the "Holler Parcel"). Judith Ann Nelkie Rapanos owned the Holler parcel from approximately April 1990 to July 1994; thereafter it was owned by PRBE. The Holler parcel was sold to Judith Ann Nelkie Rapanos in approximately April 1990 pursuant to a land sales contract, the approximate terms of which were that there would be an annual payment to the seller followed by a balloon payment in April 1993. Judith Ann Nelkie Rapanos became the fee owner of the Holler Parcel on or about April 5, 1993, pursuant to a warranty deed. The Holler Parcel was thereafter sold by from Judith Ann Nelkie Rapanos to Pine River Bluff Estates, Inc. by quitclaim deed dated July 21, 1994. Pine River Bluff Estates, Inc. has owned the Holler Parcel continuously since approximately July 21, 1994 except for sales of subdivided parcels.

18. Parcels 800, 000, 750, 100, and 401, as approximately identified on Ex. __, are also known as the Popescu property (hereinafter the "Popescu Parcel"). Judith Ann Nelkie Rapanos owned the Popescu parcel from August 1990 until April 1996; thereafter it was owned by PRBE. The Popescu Parcel was sold to Judith Ann Nelkie Rapanos on approximately August 15, 1990 pursuant to a land sales contract, the approximate terms of which were that there would be an annual payment to the seller followed by a balloon payment in August 1995. Judith Ann Nelkie Rapanos became the fee owner of the Popescu Parcel on or about December 19, 1995, pursuant to a warranty deed. That warranty deed is Exhibit 9 to the PRBE Depo. The Popescu Parcel was thereafter sold from Judith Ann Nelkie Rapanos to Pine River Bluff Estates, Inc. on approximately April 12, 1996. Pine River Bluff Estates, Inc. has owned the Popescu Parcel continuously since approximately April 12, 1996 except for sales of subdivided parcels.

19. Parcel 550 as approximately identified on Pl. Ex. *8 is also known as the Marsh property (hereinafter the "Marsh Parcel"). Judith Ann Nelkie Rapanos owned the Marsh parcel from May 2, 1990 until April 12, 1996; thereafter it was owned by PRBE. The Marsh Parcel was sold to Judith Ann Nelkie Rapanos on approximately May 2, 1990 pursuant to a warranty deed. That warranty deed is Exhibit 13 to the PRBE Depo. The Marsh Parcel was thereafter sold from Judith Ann Nelkie Rapanos to Pine River Bluff Estates, Inc. on approximately April 12, 1996. This sale occurred at the same time as the sale of the Popescu parcel. Pine River Bluff Estates, Inc. has owned the Marsh Parcel continuously since approximately April 12, 1996 except for sales of subdivided parcels.

20. Parcels 500, 356, and the "triangle" are also known as the Bailey House property (hereinafter the "Bailey Parcel"). The "triangle" is a small, miscellaneous piece of land

that was accidently omitted from the deed descriptions. It is approximately identified on Exhibit 4 to the PRBE Depo. Pine River Bluff Estates, Inc. has owned the Bailey Parcel from April 6, 1996 to the present except for sales of subdivided parcels. The Baily house property (minus the triangle) was sold by Mary Boss to Pine River Bluff Estates, Inc. on approximately April 8, 1996 pursuant to a warranty deed. That warranty deed is Exhibit 12 to the PRBE Depo. The "triangle" was sold by Mary Boss to Pine River Bluff Estates, Inc. on approximately July 30, 1996, pursuant to a warranty deed. That warranty deed is Exhibit 11 to the Deposition of Pine River Bluff Estates, Inc., taken on October 15, 1998.

21. In addition to owning portions of the Pine River Site during 1990 to 1996, Judith Ann Nelkie Rapanos held herself out to state regulators as the owner of the Pine River Site, and knew that there may be wetlands on the site.

22. Judith Ann Nelkie Rapanos as President of Pine River Bluff Estates, Inc., signed contracts for work to be done at the Pine River Site by Pat's Gradall.

23. The work performed at the Pine River Site consisted principally of ditch construction and ditch cleaning, road construction, and tree and brush clearance. Work at this site was performed by Defendant Prodo, Inc. Pat's Gradall, Three-S Construction, Bilacic Trucking, and Fisher Contracting.

24. Bilacic Trucking's work at the Pine River Site consisted of clearing roads and ditching with an excavator, and removing trees and stumps during the 1992-1994 time frame. Some material from ditching was spread on the road, spread on adjacent wooded lots, temporarily mounded and thereafter spread out with a bulldozer or removed from the site. Bilacic both cleared existing ditches and excavated new ones at the Pine River Site.

25. PGS' work at the Pine River Site began in 1992. It included using an excavator, a scraper and a loader. During 1995-1996, PGS' work involved consisted of "fine-tuning" ditching previously done by Bilacic Trucking. The ditch work PGS performed was like that performed by Bilacic Trucking, but on a finer scale. PGS' work involved the use of excavators. Pat's Gradall was also at the Pine River Site during 1995-96.

26. Three-S' work consisted of making and clearing roads through the property for the purpose of hauling sand out.

27. Prodo's work at the Pine River Site was of the same general type as that of Bilacic Trucking: excavating, ditch and road building and road clearing, stripping roads spreading dirt or pushing trees with a bulldozer. The Prodo work at the Pine River Site was performed by employees Bill Wyatt, Bill Stapleton, Jerald Schneider and Tony Pobocik. Prodo stripped roads and dug ditches with an excavator. In some cases, Prodo removed material from the ditches and put it into the lots next to the ditch, and then graded it. Prodo began work at the Pine River Site as early as 1992 and continued between 1993 and 1998.

28. Fisher Contracting hauled trees and burned stumps at the Pine River Site in December 1992. Fisher Contracting used a grapple machine to shake out and separate the dirt from the wood and logs. Some logs were hauled off for burning and some logs were left on site. The dirt was left on site in a pile.

29. On October 12, 1992, Charles Dodgers received a complaint from a citizen stating that road and ditch construction that had begun six weeks prior at the Pine River Site.

30. On October 14, 1992, trucks were hauling sand off the Site and a bulldozer was pushing sand into two areas.

31. On October 14, 1992, an employee of Pat's Gradall and an employee of Prodo were constructing a road. These individuals used a backhoe and a bulldozer to clear vegetation.

32. On October 14, 1992, an employee of Prodo was using a bulldozer.

33. On December 17, 1993, ditches were being dug. On that date, an employee of Three-S was operating a bulldozer.

34. The Pine River, a water of the United States, ultimately flows into Lake Huron.

D. FACTS RELEVANT TO THE HINES ROAD SITE

35. From November 1991 to the present, either Defendant Prodo, Inc., or Defendant John A. Rapanos, has owned fee simple title to all portions of the Hines Road Site on which the Plaintiff alleges unlawful activities took place.

36. The Hines Road Site consists of four parcels, which divide the Site roughly in quarters.

37. The Defendants refer to the southwest parcel of the Site as the "Northwood/South" parcel. Defendant Prodo has owned this parcel continuously since January 1992.

38. The Defendants refer to the southeast portion of the Site as the "Camp" parcel. Defendant John A. Rapanos owned this parcel in 1991, and sold it to Defendant Prodo in 1992, who has owned it continuously since then.

39. The Defendants refer to the northwest portion of the Site as the "Northwood/North" parcel. Defendant Prodo owned this parcel from January 1992 until Defendant John A. Rapanos bought it in 1997.

40. The Defendants refer to the northeastern portion of the Site as the "Riecker" or "Riecker and Gillespie" parcel.

Defendant John A. Rapanos owned this parcel in 1990, sold it to Defendant Prodo in 1992, and then bought it back in 1997. Prodo, Inc. received a portion back in 1998—the balance was deeded to the Duckhunter's Memorial Foundation.

41. The principal entities performing work at the Hines Road Site were Defendant Prodo, Inc., Pat's Gradall, Bilacic Trucking, Inc., and Fisher Contracting.

42. One or more Defendants conducted, authorized, or contracted or paid for the work performed by these contractors.

43. Work performed by Prodo, Inc. at Hines Road was generally directed by John A. Rapanos, with some oversight from Jeffrey T. brown. Work performed by Pat's Gradall at the Hines Road site was requested by John A. Rapanos and instructed by John A. Rapanos. This work was paid for by Prodo. Some of the work performed by Bilacic Trucking at the Hines Road Site was generally directed by John A. Rapanos and was performed for Prodo. Prodo hired Bilacic Trucking to do the work Rapanos requested at the Hines Road Site. Prodo paid for the work performed by Bilacic Trucking. John A. Rapanos also generally directed the work performed by Fisher Contracting at the Hines Road Site. Fisher's work at the Hines Road Site was also overseen to some extent by Jeffrey Brown.

44. The work performed at Hines Road consisted principally of cultivation for crops, and consisted of ditching, earthmoving, planting, seeding and plowing.

45. The work was performed with equipment including an excavator, bulldozers, scrapers and back hoes, tractor, disc, plow and spreader.

46. The work performed by Bilacic Trucking at the Hines Road Site began in November 1991 and included cleaning ditches, using an excavator bucket to pull material out

of ditches, and, in at least one instance, spreading that material on the ground. In addition, Bilacic removed trees in some areas to make room for the spoils. Bilacic Trucking also planted a crop in the cleared areas in 1992.

47. Prodo's work at the Hines Road Site included cleaning washouts, putting in culverts, taking off topsoil, pushing sand around. Prodo's work at the Hines Road Site was performed by employees Jerald Schneider and Tony Pobocik. Prodo planted, seeded, cleaned ditches and disced.

48. Fisher Contracting's work at the Hines Road Site involved separating piles of brush and trees from soil. Fisher Contracting used a 50-ton D-9 bulldozer for thi ork.

49. The work performed by Bilacic Trucking was performed with bulldozers and excavators.

50. The work Pat's Gradall and Fisher Contracting performed at Hines Road was performed with bulldozers.

E. FACTS RELEVANT TO THE TITTABAWASSEE RIVER (MAPLETON) SITE

51. From at least September 1990 to the present, Defendant John A. Rapanos has owned fee simple title to all portions of the Tittabawassee River (Mapleton) Site on which the Plaintiff alleges unlawful activities took place.

52. The principal entities performing work at the Tittabawassee River Site were Defendant Prodo, Inc. and Pat's Gradall.

53. The work performed by these contractors was conducted, authorized, or contracted or paid for by John Rapanos. Work performed by Defendant Prodo, Inc. was generally directed by John A. Rapanos. Pat's Gradall was hired by John A. Rapanos, and the work performed by Pat's Gradall was also generally directed by John A. Rapanos.

54. The work at the Tittabawassee River Site involved cleaning of a ditch.

55. On August 27, 1992, a citizen told the State that a bulldozer and a hydro unit had dug a new ditch.

56. The 1992 work consisted of cleaning out a ditch or stream for 350 feet proceeding west from the road, and then turning ninety degrees and proceeding another 570 feet towards the south.

57. The work at the Tittabawassee River Site involved the use of excavators and bulldozers.

58. The ditchbed that was cleared at the Tittabawassee River Site had a direct surface water connection to the Tittabawassee River, which in turn is a tributary to the Saginaw River, which flows into Saginaw Bay.

59. Pat's Gradall performed work in a stream at the Tittabawassee River Site. This work is described also on Exhibit 8 to the *PGS Depo.*

F. FACTS RELEVANT TO THE FREELAND SITE

60. From November 7, 1990 to December 30, 1992, Defendant John A. Rapanos owned the portion of the Freeland Site (sometimes referred to as the M-47 and Tittabawassee Road site) on which the Plaintiff alleges unlawful activities took place.

61. The principal entities performing work at the Freeland Site were Defendant Prodo, Inc. and Pat's Gradall.

62. The work performed by Prodo and PGS at the Freeland Site was conducted, authorized, or contracted or paid for by one or more Defendants. Work performed by Defendant Prodo, Inc. was generally directed by John A. Rapanos, with some oversight by Jeffrey Brown. Work performed by Pat's Gradall was generally directed by John A. Rapanos.

63. The work at the Freeland Site involved the filling of a ravine as part of the installation of a storm sewer.

64. The work at the Freeland Site was performed by a loader, bulldozer and excavator.

65. Pat's Gradall placed a drain pipe and backfilled it with sand. Similar work was performed by Prodo, Inc. Portions of the ravine were excavated prior to the laying of pipe. On at least two occasions after the initial placement of the drain pipe and backfilling, the structure washed out and PGS had to bring in more sand.

66. Pat's Gradall's activities at Freeland involved the use of a bulldozer and an excavator.

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Civil Action No.
94-CV-70788-DT

JOHN A. RAPANOS, JUDITH A. NELKIE-RAPANOS, PRODO, INC., ROLLING MEADOWS HUNT CLUB, and PINE RIVER BLUFF ESTATES, INC.,

HON. BERNARD A. FRIEDMAN

Defendants.

_____/

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND FINDINGS

Plaintiff has filed a motion to amend the court's findings of fact and conclusions of law in order to correct five errors. The motion is unopposed. Accordingly,

IT IS ORDERED THAT the court's findings of fact and conclusions of law are hereby amended as follows: (1) on page 3, line 6, the citation is amended to read "33 C.F.R. § 328.3(b) (2000)," instead of "33 C.F.R. § 323.2(c)"; (2) on page 32, lines 3-4 (Conclusion of Law number 3), the citation is amended to read "33 C.F.R. § 328.3(a)(7)," instead of "33 C.F.R. 323.2(a)(7)"; (3) on page 32, lines 3-5 (Conclusion of law number 3), the word "both" and the phrase "and because the destruction of these wetlands has had an adverse effect on interstate commerce" are deleted; (4) on page 32, line 12 (Conclusion of Law number 4), the citation is amended to read "33 C.F.R. § 328.3(a)(7), (c)," instead of "33 C.F.R.

§ 323.2(a)(7), (c)"; and (5) on page 32, Conclusion of Law number 5 is deleted.

SO ORDERED.

JAN 10, 2003 /s/ Bernard A. Friedman
BERNARD A. FRIEDMAN
UNITED STATES DISTRICT JUDGE

CLOSED
11 FEB 2003

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)
Plaintiff,	)
v.	) Civil Action
	) No. 94-CV-70788DT
JOHN A. RAPANOS; *et al.*	) HON. BERNARD
	) FRIEDMAN
Defendants.	)

PARTIAL FINAL JUDGMENT

This matter came on for trial in two phases before the Court, Honorable Bernard Friedman, District Judge, presiding.

In the first phase, on liability, the Court found that Defendants violated section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), by discharging pollutants from a point source into waters of the United States at the Salzburg Road Site, the Hines Road Site, and the Pine River Site. The Court also found that Defendants violated the CWA by failing to comply with an administrative information request and with two administrative orders issued by the United States Environmental Protection Agency ("EPA"). *See* Finding of Fact and Conclusions of Law (Mar. 22, 2000) (amended Jan. 8, 2003).

In the second phase, on remedy, the Court ordered Defendants to prepare a detailed mitigation plan, to allow the United States an opportunity to comment on the mitigation plan, and to submit a detailed commitment to deposit at least $3 million with the Court to ensure that the mitigation plan will be adequately funded. *See* Order Regarding Remedy Phase (Oct. 24, 2000). The Court subsequently approved a $2.6 million letter of credit from Chemical Bank and Trust Company, which, in conjunction with the use of the necessary acreage from Defendants' land, the Court found ensures adequate funding of the mitigation plan. *See* Order Approving Financial Commitment (Jan. 10, 2003). The Court also enjoined Defendants from transferring any assets except in the ordinary course of business, required Defendants to give the United States written quarterly notice of all transfers of real estate where the consideration is in excess of $100,000, and deferred ruling on the United States' penalty request until after the initial stages of the mitigation are completed. *Id.*

Because the Defendants' liability has been fully heard and decided, but remedial issues such as the United States' request for a civil penalty, and the Defendants' preparation and implementation of an appropriate mitigation plan, remain subject to further decision and order, the Court finds that there is no just reason for delay in entry of partial final judgment pursuant to Fed. R. Civ. Pro. 54(b). Therefore, it is Ordered and Adjudged that:

1. Prior to the Defendants' activities in this case, the Salzburg Road Site contained 28 acres of wetlands, the Hines Road Site contained 64 acres of wetlands, and the Pine River Site contained 49 acres of wetlands.

2. The Kawkawlin River, the Tittabawassee River, and the Pine River are waters of the United States. The demonstrated connections between the wetlands at the Salzburg Road Site and the Kawkawlin River, the wetlands at the Hines

Road Site and the Tittabawassee River, and the wetlenads at the Pine River Site and the Pine River, establish that these sites contain wetlands that are adjacent to waters of the United States, within the meaning of 33 C.F.R. § 328.3(a)(7).

3. Defendant John A. Rapanos violated CWA section 301(a), 33 U.S.C. § 1311(a), by discharging pollutants from a point source into 22 acres of wetlands at the Salzburg Road Site, into 17 acres of wetlands at the Hines Road Site, and into 15 acres of wetlands at the Pine River Site. Defendant John A. Rapanos also violated the CWA by failing to comply with a May 1991 administrative information request and with administrative orders issued by the EPA in 1991 and 1997.

4. Defendant Prodo, Inc., violated CWA section 301(a), 33 U.S.C. § 1311(a), by discharging pollutants from a point source into 17 acres of waters of the United States at the Hines Road Site, and by failing to comply with a 1997 administrative order issued by the EPA.

5. Defendant Judith A. N. Rapanos violated CWA section 301(a), 33 U.S.C. § 1311(a), by discharging pollutants from a point source into 15 acres of waters of the United States at the Pine River Site, and by failing to comply with a 1997 administrative order issued by the EPA.

6. Defendant Pine River Bluff Estates, Inc., violated CWA section 301(a), 33 U.S.C. § 1311(a), by discharging pollutants from a point source into 15 acres of waters of the United States at the Pine River Site, and by failing to comply with a 1997 administrative order issued by the EPA.

7. Defendant Rolling Meadows Hunt Club violated the CWA by failing to comply with a 1997 administrative order issued by the EPA.

8. Defendants shall prepare and file a mitigation plan to construct a mitigation site of at least 100 acres. The plan shall identify the mitigation site, explain every step of the

mitigation process, detail the plantings to be used, set out a timetable for the implementation of each step, provide for monitoring and adjustment for at least five years, and indicate a total estimated cost. Defendants shall serve a draft of the plan on the United States before filing it with the Court and allow the United States an opportunity comment on the draft mitigation plan. Defendants, jointly and severally, shall perform the mitigation plan.

9. Defendants shall not transfer any assets except in the ordinary course of business, and shall give the United States written quarterly notice of all transfers of real estate where the consideration is in excess of $100,000. Such notice shall contain the names of the transferor and the transferee, the type and amount of consideration given and received in the transfer, the location of the transferred property, the date of transfer, and, upon request from the United States, the address and telephone number of the transferee.

10. Upon completion of the work called for in the mitigation plan, title to the acreage shall be transferred to an independent third party with conservation management experience, to be approved by the Court, and the deed or deeds transferring ownership shall include appropriate restrictions to ensure that the mitigation area remains intact in perpetuity.

11. The Court specifically reserves ruling on the United States' request for a civil penalty, until after the initial stages of the mitigation are completed.

12. Each party is to bear its own costs and fees.

Dated at Detroit, Michigan this ___ day of 11 FEB 2003, 2003.

/s/
Clerk of Court